IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1304

JEROME S. WAGSHAL,

Petitioner,

v.

THE HONORABLE JOSEPH A. CALIFANO, JR., invidually and as Secretary of Health, Education, and Welfare; THE HONORABLE ROY L. ASH, individually and as Director of the Office of Management and Budget; BERTRAM S. BROWN, M.D., individually and as Director of the National Institute of Mental Health; THE HONORABLE GEORGE PRATT SCHULTZ, individually and as Secretary of the Treasury; ELMER B. STAATS, individually and as Comptroller General of the United States;

National Council of Community Mental Health Centers, Inc., Palm Beach County Comprehensive Community Mental Health Center, Inc., The Buffalo General Hospital; Columbia Area Mental Health Center; Alameda County, California; Central City Community Mental Health Association, Incorporated; Highline-West Seattle Mental Health Association;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

This petition seeks reversal of a decision denying a fee award to an attorney who successfully represented a plaintiff class. There are three lower court opinions, the

original decision on the merits, the district court's opinion awarding a fee, and the court of appeals' opinion overturning the fee award. These are:

1. The decision on the merits: *National Council of Community Mental Health Centers, Inc. v. Weinberger,* 361 F.Supp. 897 (D.D.C. 1973), hereinafter referred to as *"NCCMHC I,"* and set out *infra* in the Appendix 4a-14a. This was preceded by a preliminary injunction. 1a-3a.

2. The fee award by the district court: *National Council of Community Mental Health Centers, Inc. v. Weinberger,* 387 F.Supp. 991 (D.D.C. 1974), hereinafter referred to as *"NCCMHC II,"* and set out *infra,* 15a-25a.

3. The decision of the court of appeals reversing the fee award is unreported: *National Council of Community Mental Health Centers, Inc. v. Mathews,* Nos. 75-1335 and 75-1353 (D.C. Cir. decided Nov. 9, 1976, rehearing den. January 13, 1977), set out *infra,* 26a-36a.

Related petitions for certiorari in this Court, and a related appeal pending in the court of appeals are noted, *infra,* pp. 14, in the statement of the case.

JURISDICTION

The court of appeals denied a timely petition for rehearing on January 13, 1977. 37a. This petition is filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. When an attorney who represented a duly certified plaintiff class of community mental health centers, and who was retained by their national organization and six community mental health centers as class representatives

under an arrangement contemplating a "common benefit" fee award from the class members if the case were successful, obtained the release of over $52,000,000 in federal grant funds plus other substantial benefits for the class, did the court of appeals err in reversing an order of the district court awarding a fee to the attorney under the "common benefit" principle, and specifically:

A. Did the court of appeals err in holding that the attorney could not be paid from a portion of the released grant funds which remained "unused" by the grantee-class members, and that 28 U.S.C. § 2412 barred such use of the grant funds, when three other statutes required the full release of the funds, prevented the federal government from retaining the money, and made the funds fully available for obligation pursuant to court order.

B. Did the court of appeals err in holding that the district court lacked *in personam* jurisdiction to order the class members to pay a fee directly to the attorney who successfully represented the class, on the ground that the plaintiff class was inadequately represented in the fee application proceeding, when (i) the class members were given adequate notice of the fee application and an opportunity to appear and oppose it; and (ii) several class representatives did so appear by separate counsel.

C. Did the court of appeals err in failing to provide any means or procedure by which the "common benefit" principle could be vindicated by a fee award in this case.

2. Were the standards applied by the district court in setting the amount of the fee and affirmed by the court of appeals, correct, and specifically:

A. Was the district court correct in relegating attorneys who serve the public interest in class actions to a lesser economic status than those who devote themselves to commercial practice.

B. Was the district court correct in refusing to award a fee which reflected the risk of no fee recovery, *i.e.*, the contingency.

C. Was the district court correct in setting a fee by its "feel" of the case without specifying what value it was placing on the various factors which it considered.

STATUTES INVOLVED

28 U.S.C. §2412, 80 Stat. 308

> Except as otherwise specifically provided by statute a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. . . .

31 U.S.C. §665b, 87 Stat. 134

> Any provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds.

42 U.S.C.A. §2661 note, 84 Stat. 353 (hereinafter "Sec. 601")

> Notwithstanding any other provision of law, unless enacted after the enactment of this Act expressly in limitation of the provisions of this section, funds appropriated for any fiscal year ending prior to July 1, 1973, to carry out any program for which appropriations are authorized by . . . the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963 (Public Law 88-164, as amended) shall remain available for obligation and expenditure until the end of such fiscal year.

Pub.L. 93-245, §501, 87 Stat. 107 (hereinafter "Sec. 501")

> Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974, are hereby appropriated out of any money in the Treasury not otherwise appropriated. Such appropriations shall remain available for obligation through the later of the day on which a final determination finding the impoundment legal is made or one year following the day on which the impoundment is found illegal.

STATEMENT OF THE CASE

This litigation arose out of the unprecedented policy adopted by the Nixon Administration in 1973 of refusing to continue statutory programs, and withholding, or "impounding," funds appropriated for grants to private recipients. A number of these impoundments occurred in programs administered by the department of HEW.[1]

The specific impoundment involved in this litigation was the FY 1973 appropriation for first year grants under the Community Mental Health Centers Act, as amended, 42 U.S.C. §§2688-2688d, 2688u. 4a. Because the statutory scheme of this grant program is important to the issue presented for review, it merits explanation.

This grant program funded community mental health centers ("CMHCs"), which are private, *i.e.*, non-federal organizations set up to provide mental health services in

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[1]These events are generally referred to in the legislative history of the Congressional Budget and Impoundment Control Act of 1974, Pub.L. 93-344, 31 U.S.C. §§1400 *et seq; see* 1974 *U.S. Code Cong. & Admin. News,* 3462.

the communities which they are designated to serve. The grant program contemplated a first year grant, followed by seven years of "continuation" grants. A grantee-CMHC received between 75% and 90% of the initial year's cost of the program by its Federal grant, and had to make up the remainder out of locally raised funds. 42 U.S.C. §§2688(b), 2688g(b).[2] In the succeeding seven years, the CMHC received generally decreasing percentages of "continuation" grants, between 35% and 80% from HEW, again with the CMHC making up the remainder. By the end of the eight year period the CMHC program was hopefully to be self-sustaining.

The CMHC impoundment did not attempt to cut off the "continuation" grants, which were essentially a federal commitment once the program had been funded by an initial year's grant. Rather, the impoundment withheld first year grants which would permit the initiation of new, additional community mental health center programs and organizations. Had the impoundment succeeded, the CMHC program would have run out of its federal funding after continuation grants for existing programs had been paid out.

The National Council of Community Mental Health Centers, ("NCCMHC") responded to this impoundment by seeking legal counsel. The NCCMHC, like its CMHC members, is a private organization, the only organization consisting of CMHC membership and devoted to CMHC purposes, and whose membership included most of the CMHCs throughout the country. Unable to pay legal fees at prevailing rates in the District of Columbia, the NCCMHC sought legal services on a charity basis from a number of sources but was unable to obtain representa-

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[2]The comparable present statutory provision is to be found in 42 U.S.C. §2689b. (c).

tion. Thereafter, Jerome S. Wagshal, Esq. (hereinafter "petitioner"), agreed to undertake the case on an arrangement modeled after that approved by this Court in *Central RR & Banking Co. v. Pettus*, 113 U.S. 116, 125 (1885), *i.e.*, the NCCMHC agreed to pay an hourly rated fee of $35, which was recognized as being substantially below petitioner's regular hourly charge, with this proviso (30a, n.5):

> It is understood that the above hourly rate and initial retainer is substantially less than would normally be charged for a matter of this nature. The proposed action will be filed as a class action on behalf of a class of community mental health centers, as well as the National Council. If, as a result of this litigation, a substantial benefit is conferred upon the plaintiff class, it is agreed that we will apply to the Court for an appropriate fee award from those class members benefiting therefrom. . . .

In addition to the NCCMHC, six individual CHMCs which had applied for grants were named as plaintiffs and class representatives, and this fee arrangement was confirmed with them by written agreement. After the case was filed, the NCCMHC widely publicized the nature of this fee arrangement by mailings to member and non-member CMHCs throughout the country. There is no evidence in the record of any dissent to this arrangement, until after the case was won and a fee application was made.

The remainder of this statement will summarize the results of the litigation on the merits, the fee award proceeding and decision in the district court, and the reversal of this fee award in the court of appeals.

A. The Decision On the Merits, *NCCMHC I.*

The case was filed near the close of FY 1973, and plaintiffs therefore sought a preliminary injunction, putting the impounded FY 1973 funds under judicial control. The purpose of this move was to avoid potential arguments (actually made in other cases filed later) that the funds had "lapsed" and were unavailable for obligation. The district court granted this preliminary injunction. 1a. Among the provisions of this Order were two which required that the "impounded" funds be recorded and treated as "expended:"

> (7) The defendants shall, not later than June 30, 1973, take all actions necessary duly to record the [impounded] sums . . . as expended pursuant to all laws . . . and retain said sums in an account earmarked as so expended in the name and credit of this Court.
>
> (8) The [impounded] sums . . . duly recorded as obligated and expended, shall remain so until further Order of this Court. . . .

In addition, the district court certified the case as a class action under Rules 23(b)(1) and (2). 1a.

Thereafter the matter proceeded to decision on cross motions for summary judgment and the result was a full victory for the plaintiff class. The district court dismissed the defendant government officials' "litany" regarding sovereign immunity and the "political question" defense (7a) and held that the matter was one of "statutory interpretation and constitutional construction." 8a. The court held

> . . . that Congress intended to require a full commitment of the fiscal 1973 appropriated funds by the end of the fiscal year.

10a. In determining Congressional intent, the court relied principally on the Medical Facilities Construction and Modernization Amendments of 1970, Publ.L.No. 91-296, Title VI, §601, 84 Stat. 353, 42 U.S.C.A. §§201 note and 2661 note (hereinafter referred to as "Sec. 601"). The court held that Sec. 601 "makes mandatory the spending of funds appropriated under the Act for fiscal 1973." 12a. The court buttressed this conclusion by a detailed review of the legislative history of this law, including its veto by the President because the funds "must be spent," and its passage after that veto. 13a. The purpose of the statute was shown to be "to prevent administration imposed . . . reductions . . . from applying to health programs." *Id.*

B. The District Court's Fee Award Decision, *NCCMHC II.*

As contemplated by the retainer agreement, petitioner applied for a fee award. The district court directed that notice be sent to all benefiting class members, which was done. The notice advised them that:

> 1. You have been awarded a grant subsequent to June 30, 1973 from fiscal 1973 funds released by this action, and are thus a member of the plaintiff class. *You will be bound by the judgment of this Court in the matter of the aforesaid application for an attorney's fee and will be required to pay your pro rata share of the fee.*
>
> 2. You may, but need not, enter an appearance for the hearing through counsel of your choice, and you will have all the rights provided by law, including those set forth in rule 23, Federal Rules of Civil Procedure. You may, but need not, through counsel of your choice, appear and be heard at the aforesaid hearing on October 31, 1974, at 10:00 a.m. You may, but need not, submit a written statement with

> or without aid of counsel to the Court for its consideration if you deem it appropriate. Any counsel desiring to appear must notify the clerk of court in writing by October 25, 1974. [Emphasis in original]

In another significant action, the district court directed the defendant Secretary of HEW to reserve a fund of some of the CMHC grant money which had not yet been withdrawn by the grantees or which had not yet been expended, and ordered a report of the amount so reserved. On the date the report was due, the Secretary failed to file the report, and instead moved "for Relief" from this order. As explained in more detail, *infra*, pp. 24-25, the defendant Secretary claimed that he could not reserve the funds because once the funds were obligated to grantee CMHCs (as all the funds had been), they could not be withdrawn for the court-reserved fund. In other words, the claim was that the grant money belonged to the grantees, *not the United States.*

Without ruling directly on this motion, the district court brushed it aside in its fee award decision. It held that:

> The record discloses that a portion of the money released by the litigation remains unused. The amount is more than sufficient to pay any reasonable attorney's fee in this situation and is still subject to the Court's control as a result of orders entered during the proceedings, even though the precise accounting as to this sum must await final auditing.

18a-19a. Prior to holding that it could award a fee from this sum, the district court held that "in its discretion" it would not exercise *in personam* jurisdiction over the class members to require them to pay a fee directly to petitioner, because it

> . . . determined that the representation of class members has been inadequate to support *in personam* judgments for attorney's fees against the class members.

18a. It found that the NCCMHC was an inadequate class representative even though it retained separate counsel for the fee proceedings. It based this conclusion on the fact that the NCCMHC "expressly disclaimed the ability to represent the class," had not received any of the released funds directly, and was claiming return of the money it had advanced petitioner at the reduced hourly rate. Since none of the CMHCs "originally named as plaintiffs and certified as representatives of the class has appeared by separate attorney in the portion of the case relating to Mr. Wagshal's fee applications," the court held that it was unable to enter an *in personam* judgment against the class members. In reaching this conclusion, the court drew a distinction between the *in personam* situation in which an "adequate representative" of the class had to appear, and the award of a fee from a fund, *i.e., in rem,* in which no such "adequate representative" was needed. 18a, n.2.

In deciding on the proper amount of a fee, the district court found that

> Mr. Wagshal worked energetically with full devotion to his client [sic] His papers on the merits were of quality and perceptive.

23a. Earlier the court stated, "Mr. Wagshal's clients were and are well satisfied with his professional efforts and as far as his work on the merits is concerned, it was of high quality." 21a. The court was however critical of petitioner's papers on his fee application.

The court reviewed in general terms the considerations leading to the determination regarding the amount of the fee award, but it made no specific findings regarding what

values if any it assigned to any particular factor. Instead, it indicated it was deciding on the basis of "a feel for these factors . . ., intangible and uncertain as they may be." 23a. Among the factors considered were these:

– "As a sole petitioner, [petitioner's] work was at many different gradations of professional responsibility and no flat hourly rate can reasonably be applied to his work as a whole." 22a.

– there was "no standard rate in this community even as between lawyers of comparable ability and responsibility." 23a.

– that the contingency factor, *i.e.*, the risk of fee recovery, would not be taken into account, merely payment for "useful time, plus a bonus for the result." 22a.

– finally, that petitioner would not be rewarded at the level of commercial charges in the private sector, but at some lower standard, because this case served the public interest. The court stated (24a):

> Those lawyers who choose the commendable course of serving the public interest rather than building a more remunerative commercial practice cannot expect the same financial awards as such practitioners sometimes achieve. . . . Awarding of fees is not intended to accomplish other social purposes, nor is it the function of the Court to attempt to equalize financial awards for all types of legal work. . . .

Using these standards, the court set a gross fee of $65,000 (a $50,000 basic fee plus $15,000 "for the result"). From this, the district court ordered petitioner to refund the $13,216.25 in advance fees paid by the NCCMHC, leaving petitioner a net of $51,783.75.

C. Reversal of the Fee Award by the Court of Appeals.

The court of appeals overturned this award, reaching this result by three conclusions. First the Court held that the "unexpended funds" from which the award was made "do not remain at the grantee's disposal if they have not been 'expended' by the end of the fiscal year," and that such "unexpended funds are thus in the safekeeping of the public treasury until their use is once again authorized." 32a. From this, the court determined that the United States is "the owner of the unexpended grant funds." The court concluded that since the money belonged to the United States, 28 U.S.C. §2412 barred an award from these funds.

Second, the court affirmed the district court's holding that it lacked jurisdiction to make an *in personam* award in petitioner's favor because "none of the individual class members ever made an appearance before the district court and there was no one else present to adequately represent their interests in the fee case. . . ." 35a. The court suggested that petitioner

> . . . should have provided in his retainer agreement for full payment of his fee or else he should have structured his pleadings in the district court in such a way as to inform the court and class members that he would be seeking an additional fee if he were successful on the merits.

Id. With these two rulings the court concluded, "Although we recognize that Wagshal has rendered a significant service on behalf of the community mental health centers we cannot award him a reasonable fee." 36a.

Finally, despite the conclusion that petitioner could have no award, the court of appeals nevertheless held that the district court had followed proper guidelines in

arriving at the award, and had made "an eminently reasonable award in this case." 36a.

* * *

The Court's attention is invited to the pendency of related cases in this Court and the court of appeals. In this Court, certiorari is being sought in *National Association of Regional Medical Programs, Inc., et al. v. Califano,* No. 76-1266 (filed March 11, 1977), hereinafter referred to as "the *NARMP* case."[3] The *NARMP* case, decided in the district court prior to the instant case, also deals with the award of a fee to the petitioner in this case, for services on behalf of a plaintiff class in another anti-impoundment litigation under a different HEW grant program. The same panel of the court of appeals which decided this case, and overturned the fee award, thereafter decided the *NARMP* case and also overturned the award made by the district court there.

Petitioner was the attorney representing the plaintiff classes in yet a third anti-impoundment action in which he was awarded a fee by the district court, *National Association for Mental Health, Inc. v. Weinberger,* 68 F.R.D. 387 (D.D.C. 1975). The appeal of that award is now pending in before the same court of appeals, *sub nom., National Association for Mental Health v. Califano,* Nos. 75-2212 and 2245 (D.C.Cir.), "the NAMH case," and briefing has not been completed.

Each of these three cases, the *NCCMHC* case (the instant case), the *NARMP* case, and the *NAMH* case,

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[3]The NARMP petition, No. 76-1266, should not be confused with *National Association of Regional Medical Programs, Inc., et al. v. Califano,* No. 76-1265, also filed March 11, 1977, referred to hereinafter as "the *NARMP* impoundment case." The *NARMP* impoundment case seeks review of lower court decisions permitting the Secretary of HEW to withhold over $1.8 million of the regional medical program appropriation from being granted to the plaintiff class, as distinguished from the *NARMP* case, *supra,* which concerns a reversal of a fee award, as in the instant case.

involve significantly similar issues, but there are distinguishing facts among them, and some distinguishing statutory provisions as well, principally the different statutory grant programs involved in each of the three cases. This Court may wish to await the disposition of the *NAMH* case by the court of appeals before making a determination regarding this petition and the one in the *NARMP* case.

Federal jurisdiction was invoked in the district court in the original proceeding under 28 U.S.C. §§1331, 1361, and 5 U.S.C. §§701-6.

REASONS FOR GRANTING THE WRIT

Review and reversal of the court of appeals' decision is called for, for many of the same reasons as those stated in the *NARMP* petition, No. 76-1266, though there are additional reasons calling for review here.[4] This was the first decision by the court of appeals in this trilogy of fee cases involving the petitioner, Jerome S. Wagshal. The *NARMP* decision followed this one, and relied heavily on it.

Thus this was the first decision by which the court of appeals created an exception to the "common benefit" rule, that an attorney representing a plaintiff class should be awarded a fee from the fund he obtains for the class or from the class members if he benefits them. This Court

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[4]Reference will be made to the *NARMP* petition where appropriate, but the discussion in that petition will be repeated herein to the extent necessary to make this petition a complete document in itself. Petitioner notes that among the additional matters presented by this petition are (i) the discussion regarding the carry over of CMHC grants, pp. 24-25 *infra*, and (ii) the issue of the standards for determining the amount of a fee, pp. 31-32 *infra*. Another distinguishing factor is the opposition of some class members to a fee award in this case, pp. 29-30, *infra*, whereas the class members in the NARMP case fully supported petitioner's application.

stated in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258 (1975), "That rule has been consistently followed." Now however, a single three-judge division of the court of appeals has, by two related decisions, carved out a major exception in this heretofore "consistently followed" rule. The creation of such an exception has serious, indeed, grave consequences in at least three areas of concern to this Court. There is the selecting out of a class of litigants—recipients of federal grants for medical and scientific work—who will as a practical matter be denied access to the judicial system unless the court of appeals decisions are reversed, whereas other groups of potential litigants will continue to be able to obtain legal representation under the "common benefit" principle. There is the extension of the application of 28 U.S.C. §2412 so that it serves as a shield for federal officials who unlawfully withhold grant funds from statutorily intended recipients. There is the diminution of the equitable powers of the federal judiciary, which this Court has heretofore defined far more broadly than as applied by the court of appeals. Related to this is the constitutional question of whether plaintiff classes who are benefited by successful litigation can invoke the shield of due process to avoid payment of an equitable fee merely by ignoring the notice of the fee application, and thereby leaving the class without "adequate representation" in the fee proceeding.

All these issues flow out of a fact situation which, in its essentials, consists of this: An attorney representing a class of persons claiming entitlement to federal grant funds obtained the release of over $52 million for the plaintiff class, plus other benefits. Nevertheless the court of appeals held that there was no point in the process of the release of these funds pursuant to judicial order at which the court which released the funds could order an equitable fee to be paid to the attorney, either from the

money released to the class or by the class members. As the decision now stands, over $52 million flows from the treasury to private hands pursuant to court order, and the courts cannot compensate the attorney who successfully represented the class.

This result, and the similar one reached in the *NARMP* case, constitutes an unprecedented exception to the heretofore "consistently followed" rule endorsing "common benefit" fee awards. This result simply does not square with the consistent line of decisions of this Court represented by *Trustees v. Greenough*, 105 U.S. 527 (1882), *Central RR & Banking Co. v. Pettus, supra; Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 161 (1970); and *Hall v. Cole*, 412 U.S. 1 (1973).

One of the clearest statements of the principle established by these cases was made by this Court in *Sprague, supra*, 307 U.S. at 167, that "when . . . a fund is for all practical purposes created for the benefit of others, the formalities of the litigation . . . hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." In a substantial line of cases, federal courts have applied this principle to award attorneys' fees in cases in which persons have sued successfully to obtain funds under the control of government officials. *See, e.g., United States v. Equitable Trust Co.*, 283 U.S. 738 (1931); *Houston v. Ormes*, 252 U.S. 469 (1920); *Dickinson v. Stiles*, 246 U.S. 631 (1918) (Holmes, J.); *National Treasury Employees Union v. Nixon*, 172 U.S.App.D.C. 217, 521 F.2d 317 (1975); *Lafferty v. Humphrey*, 101 U.S.App.D.C. 222, 248 F.2d 82, *cert. den., sub nom., Benton County v. Lafferty*, 355 U.S. 869 (1957); *Honda v. Mitchell*, 136 U.S. App.D.C. 22, 419 F.2d 1204 (1969); *Freeman v. Ryan*, 133 U.S. App. D.C. 1, 408 F.2d 1204 (1968); *Celebrezze v. Sparks*,

342 F.2d 286 (5 Cir. 1965); *Folsom v. McDonald*, 237 F.2d 280 (4 Cir. 1946); and *United Federation of Postal Clerks v. United States*, 61 F.R.D. 13 (D.D.C. 1973). Each of the barriers to a fee award raised by the court of appeals in this case could have been raised in some form in those cases as well, and many were. Yet in those cases, statutorily intended recipients ranging from federal employees *(National Treasury Employees [illegible]ion)*, to counties of a state *(Lafferty)* to postal clerks *(United Federation of Postal Clerks)* were able to obtain legal representation by the equitable mechanism of the "common benefit" fee award, while in this case community mental health centers cannot do so, and in the *NARMP* litigation, regional medical programs could not do so, according to the court of appeals.

To arrive at this inconsistent result, the court of appeals had to make a number of subsidiary holdings which in themselves merit review by this Court. Since the court of appeals organized these holdings under the *in rem—in personam* dichotomy, they will be discussed here in that form, although petitioner does not concede that this is a significant distinction for the issues presented. See p. 28 *infra*.

A.

THE DETERMINATION BY THE COURT OF APPEALS THAT THE FUNDS TO BE USED FOR FEE PAYMENT BELONGED TO THE UNITED STATES WAS INCONSISTENT WITH THE CASE ON THE MERITS, IGNORED CONTROLLING STATUTES, AND IMPROPERLY REVERSED THE DISTRICT COURT ON A FACTUAL FINDING

In deciding that the district court's award had to be reversed, the court of appeals held that the money from which the award would be paid belonged to the United States, and therefore was insulated from being used to pay

a fee award by 28 U.S.C. §2412. In arriving at this conclusion the court of appeals focused on the HEW's internal procedures in handling the eight-year CMHC grant program, describing them as follows (29a):

> Under normal operating procedures, the initial grant is made for the estimated cost of the first year of the project. Should this cost estimate be high in relation to the expenses incurred by the grantee in the first year, the surplus or unexpended funds are included in the computations for future grants. An estimate of the unexpended balances in all of the grantees' accounts at the end of a current budget period is made based on historical averages and then sufficient funds are appropriated to meet the next year's estimated grants. . . . Should the grantee seek a continuation award for the next year, HEW computes the amount of the grant on the basis of the estimated cost of the program for that year less the grantee's matching funds and the unexpended balance remaining from the previous year's grant. (fn. omitted.)

The court of appeals assumed that the award would be made from these "unexpended" funds, and based on this, concluded that they belonged to the United States; this was the core of its decision (32a):

> We find that the manner of disposition of these unexpended funds is conclusive evidence of their true ownership. As noted previously, these unexpended funds are one factor taken into account in determining the amount of future grants which each grantee will receive. *These funds do not remain at the grantee's disposal if they have not been "expended" by the end of the fiscal year.* It is only through a subsequent continuation grant approved by HEW that a grantee can again reach these unexpended funds which it failed to use the previous year. These unexpended funds are thus in

> the safekeeping of the public treasury until their use is once again authorized. . . . An award of attorney's fees from these funds therefore would be an award against the United States and contrary to 28 U.S.C. §2412. . . .(Emphasis added)

These statements, which led the court to disgard the "common benefit" principle, are riddled with both legal and factual error. They overlook three controlling statutes, overturn the district court on a factual conclusion which was based on undisputed evidence of record, and place the court in a position on relying erroneously on an HEW regulation to support its decision.

1. The Court of Appeals Decision Ignores Three Controlling Statutes

The basic inconsistency in this case is that the district court decided the merits of this case on the basis that the Executive had to spend the funds appropriated for the CMHCs, without "administration imposed . . . reductions. 13a. Previously, by the preliminary injunction, the court had ordered the funds to be placed in an account in its name, and treated as "expended pursuant to all laws. . . ." 2a. In short, the CMHCs as a class were held to be rightful recipients of these funds; the court held that they could not be retained by the federal government. Yet, the court of appeals' decision holds that the United States "is the owner of the unexpended grant funds." 34a. If the district court's decision on the merits was correct, there were no "unexpended" grant funds in this case, and, in any event, whether expended or unexpended, there are no grant funds which the United States was entitled to retain as an "owner."

The court of appeals' error stemmed from its failure to consider or give effect to three statutes which mandated

the full release of these funds.[5] The court of appeals focused on the microcosm how surplus funds in the account of an individual grantee-CMHC were treated in HEW accounting procedures, rather than the more relevent, bigger picture, that the funds had to be released to the class as a whole. Petitioner's equitable claim for a "common benefit" fee award was of course against the benefiting class as a whole. And the three statutes ignored by the court of appeals were likewise directed at release of the funds for the benefit of the class as a whole.

The first of these three statutes is Sec. 601, *supra,* which was the principal statutory basis for the decision on the merits. 12a-13a. It would be difficult to conceive of a legislative history which more conclusively establishes the mandatory requirement for release of the CMHC grant funds to the plaintiff class than that reviewed by the district court, including the passage of the statute over Presidential veto, in order "to prevent administration imposed . . . reductions . . . from applying to health programs." 13a.

The second statute is 31 U.S.C. §665b, which is directly contrary to the court of appeals' key conclusion. The court held that if the grant funds "have not been 'expended' by the end of the fiscal year," they go back "in the safekeeping of the public treasury until their use is once again authorized." 32a. But §665b., a statute passed specifically to prevent such accounting treatment by the Executive, provides that, "[A]ny provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall

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[5]This is the third case being brought before this Court in which the same court of appeals has ignored these three statutes. The other two are the *NARMP* petitions. See Petition No. 76-1265, pp. 11-15; petition No. 76-1266, pp. 27-28, which review these three statutes.

not be held to affect the status of any lawsuit or right of action involving the right to those funds." How could there be a more direct answer to the appellate court's conclusion, and how could such a direct answer be properly overlooked? This statute was intended to preserve the rights of "all parties" who might be affected by failure to obligate and expend the grant funds. See S.Rep. No. 93-414, pp. 5-6.

The third statute, Sec. 501, *supra*, addressed the same "lapse" issue in yet another, but no less dispositive way. This statute, passed when the Administration continued to make the "lapse" argument in anti-impoundment cases filed after the close of FY 1973, reappropriated any funds "necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded. . . ." Particularly significant is the statement in S.Rep. No. 93-614 that

> . . . this provision appropriates these impounded sums and *makes them fully available for obligation pursuant to court order*. . . .

In connection with this statute, it is particularly important to note that it requires a judicial determination of unlawful impoundment as a prerequisite for the reappropriation. Twice, in attorney's fee cases, this Court has reasoned that Congress would not have anticipated civil litigation in a statute and at the same time forbid those bringing the litigation from being able to pay their attorney. *Hall v. Cole, supra,* 412 U.S. at 13-14; *Dickinson v. Stiles, supra,* 246 U.S. at 632-33. Yet the court of appeals in this case not only ignored this logic, but even the statute which underlies it.

* * *

The court of appeals attempted to distinguish *Lafferty v. Humphrey, supra,* a case which it impliedly recognized as having similar facts, on the ground that, according to

the court of appeals, the legislation in *Lafferty* "specifically directed the executive officials 'to disburse the balances left at the end of each year,' " whereas the court of appeals believed this was not the case with respect to the CMHC appropriation. 34a. But the three statutes reviewed above, all of which were ignored by the court, specifically require the disbursal of these year-end balances, and put this case on all fours with *Lafferty*.

2. The Court of Appeals Set Aside Factual Findings By The District Court That Were Not Clearly Erroneous and Which Were Established By Defendants' Admissions

As previously noted the court of appeals' reversal turned on the conclusion that the funds from which the fee was to be paid were "unexpended" funds which "do not remain at the grantee's disposal if they have not been 'expended' by the end of the fiscal year." This was essentially a factual conclusion which rode roughshod over uncontradicted evidence in the record which established the contrary. The district court had incidentally, stated that the fee was to be drawn, not from "unexpended" funds, but from "a portion of the money released by the litigation [which] remains *unused.*" 18a. (Emphasis added) And the court held that payment of this fee will "reduce the fund by the amount of the fee awarded. . . ." 20a. The court of appeals, ignored these findings, in holding that the fee award would be a charge on the treasury rather than the class members. It also ignored the fact that all the impounded funds had been marked as "expended" since the entry of the preliminary injunction. 2a.

Even if the fee were to be drawn from "unexpended" funds remaining after the close of the grantee's initial year, rather than "unused" funds, it is difficult to understand how the court of appeals could have

concluded that such "unexpended" funds do not remain at the grantee's disposal at the end of the fiscal year. The court indicated that conclusion was based on an affidavit submitted in the district court by an HEW official, John P. Spain. 29a. But that affidavit states the contrary, and, indeed, was submitted to prove the contrary. It was submitted in support of defendants' motion for "relief" from the district court's order requiring reservation of some of the grant funds, and its purpose was to establish that the grant funds had been irrevocably granted to the grantee-CMHCs, and could not be reserved, even in part, for fee payment. The affidavit stated that year-end balances do *not* return to the "safekeeping of the public treasury" at the end of a fiscal year; it stated this in precise and specific terms:

> 10. Even if the unexpended balances in the grantees' account could be determined, *there is no authority under which the Department of Health, Education, and Welfare could "recover" these unexpended balances* unless: (a) the grantees consent to such recovery; or, (b) the grantees have failed in a material way to comply with the terms and conditions of the grant award. These limitations arise from the fact that *grantees have an entitlement to the funds awarded for the first budget period until such funds are expended or until the end of the project period (normally an eight year period),* whichever occurs first . . . Thus there is no authority under which the Department of Health, Education, and Welfare can unilaterally recover the unexpended balances of the grants made pursuant to the Court Order of August 3, 1973 [the final judgment in NCCMHC I]. (Emphasis added.)

Attached to the Spain affidavit as Exhibit "E," was a portion of an HEW manual which stated that, "Funds surplus to the grantee's needs in one budget period are

available for its use in the next." Par. 1-85-10. Two pages later, the same document stated:

> If approved for support, a grant is awarded in an amount estimated to be the necessary Federal share of costs for the first budget period [i.e., the first year]. *These funds are available for use by the grantee, however for the entire [eight year] project period.* (Emphasis added.)

By ignoring this evidence, the court of appeals violated Rule 52, Fed.R.Civ.P., in reversing the district court on its factual findings which were not clearly erroneous. What was clearly erroneous was the court of appeals' reversal.

3. The Court of Appeals Improperly Relied on An HEW Regulation

To support its conclusion that the district court's award had to be overturned, the court of appeals cited an HEW regulation which permitted payment of legal fees as an allowable overhead grant expense, except that "the prosecution of claims against the Government" were specified as unallowable. The error of relying on this regulation is that such reliance equates the defendant government officials who were found to have violated the law by their impoundment with "the Government." This violates the fundamental constitutional tenet that when public officials violate the law they are not "the Government," and thus not shielded by sovereign immunity. *Marbury v. Madison,* 5 U.S. (1 Cranch) 138, 168 (1803). In the case on the merits, the defendants' attempt to use the sovereign immunity defense and their claim they were "the Government," was rejected with the suggestion that defendants replace their "litany" with "a modicum of common sense." 7A. Yet in the court of appeals, the same argument, that was brushed aside on the merits was made controlling so as to bar a fee award.

The court of appeals holding equating the defendant government officials with "the Government" was also directly contrary to *Houston v. Ormes, supra,* 252 U.S. at 472-4, a case which is in all significant respects identical to this one except it approved the fee award at issue.

As interpreted by the court of appeals, HEW's regulation allows its officials to violate the very laws under which the regulations were issued, by prohibiting those victimized by the violations of law from having the means to obtain legal representation to prevent such violations. Such an interpretation is clearly out of harmony with the underlying statutes and therefore invalid. *Dixon v. United States,* 381 U.S. 68, 74 (1965).

B.

THE COURT OF APPEALS' DECISION IMPOSED A NOVEL AND IMPROPER REQUIREMENT FOR THE EXERCISE OF IN PERSONAM JURISDICTION IN A FEE AWARD PROCEEDING

Assuming *arguendo* that the district court could not exercise *in rem* jurisdiction, the lower courts erred in holding that the district court could not exercise *in personam* jurisdiction.[6] This error was two-sided: As a matter of law, the lower courts incorrectly imposed a requirement of "adequate representation" of the class in the fee proceeding, and, as a matter of fact, even if there were such a requirement, it was amply met in this case.

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[6]It may be questioned as to why the district court reached the *in personam* issue, since it held a few could be awarded from the grant funds. Several CMHCs wrote the court in response to the notice of fee application that they would be more seriously affected by having to pay a fee directly to petitioner from non-grant funds, since such funds were needed as matching funds for their federal grants, and each dollar of non-grant funds enabled them to receive several dollars of grant funds. Petitioner consistently advocated payment from grant funds as the better choice.

1. As a Matter of Law, Due Process Should Require Only Adequate Notice And An Opportunity to Appear, As a Prerequisite of Jurisdiction In A Fee Award Proceeding Under the "Common Benefit" Rule

The requirement imposed by the lower courts, that the plaintiff class be "adequately represented" by separate counsel in the fee award proceeding (16a-17a; 35a), runs counter to this Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In *Mullane*, this Court held that for a *defendant* class, as distinguished from a *plaintiff* class, notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," were the conditions by which "the constitutional requirements are satisfied." 339 U.S. at 314-315. Of course collusive arrangements, such as were present in *Hansberry v. Lee*, 311 U.S. 32 (1940), are not at issue in this case.

Rather, the issue here is whether in a fee award proceeding, a proceeding "supplemental" to the adjudication on the merits (*Sprague, supra*, 307 U.S. at 170), the plaintiff class must not only be given notice of the fee application and an *opportunity* to appear, but must in fact appear by separate counsel and oppose[7] the award in order for the district court to have equitable jurisdiction

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[7]In the *NARMP* litigation, this same court assumed that it was "obviously . . . not in the best interests of the individual class members" for the class representatives to support the award of a fee. See Petition in No. 76-1266 at 57A. This of course ignores the long-range effect of such an opposition on the ability of the class to obtain future representation, or the basic equities which the class members may believe the attorney is entitled to, as a result of his efforts on their behalf, and which benefited them.

to award a "common benefit" fee to the class attorney. This issue is one which carries with it important implications for the conduct of class actions generally, for two reasons:

First, as a practical matter, if, after receiving the benefits of the litigation, and after receiving adequate notice of the fee application, the class members simply choose to ignore the court's notice, and not appear by separate counsel to oppose the award, they thereby escape the jurisdiction of the court, and divest it of its equitable powers to award a "common benefit" fee—under the rule as applied by the lower courts. (Here the district court invited this result by advising the class members that they "need not" appear, see p. 9, *supra*.

Second, in *Mullane*, this Court held that the *in personam-in rem* dichotomy was not significant when it came to establishing constitutional standards. 307 U.S. at 312-13. In other words, if adequate representation is held to be a constitutional requirement for an equitable fee proceeding, it would be as much a requirement where the court had control of a fund as where it could only award a fee payable directly by the class members. (Note that the district court held otherwise. See 18a, n.2.)

In effect therefore, the decisions of the lower courts have imposed a requirement that after an attorney confers benefits on a class, he may nevertheless not receive a judicial fee award unless he then can find a way to induce the class members, or some of them, to enter into a supplemental adversary litigation with him. Like Androcoles, he must do battle against those he has previously benefited. Only here, if the lion refuses the battle, Androcles is the loser. Such a system is obviously calculated the chill all class representation. Twice this Court has indicated that fees under the common benefit principle can and should be paid directly by the parties

enjoying the benefit of the litigation, if the fee cannot be paid from the funds recovered. *Alyeska, supra,* 421 U.S. at 257; *Trustees v. Greenough, supra,* 105 U.S. at 532. The lower court decisions in this case effectively overturn these decisions.

In considering this issue, it is important to note that the constitutional standard laid down by this Court in *Mullane,* that notice and an *opportunity* to appear are enough, was expressed in the context of the trial of merits of the litigation. It is *a fortiori* even more applicable to a supplemental proceeding for the award of an equitable fee after the class has received the benefits of the suit.

2. As a Matter of Fact, The Record Establishes That The Plaintiff Class Was Separately Represented In The Fee Proceeding

In deciding the adequate representation issue, the lower courts simply ignored uncontroverted facts of record which established the adequate representation of the plaintiff class.

At the fee award hearing held after notice to all class members, Lynn R. Coleman, the District of Columbia partner of the prominent Houston and D.C. firm of Vinson, Elkins, Searls, Connally & Smith, appeared as counsel for the Puerto Rican CMHCs. He advised the court that by the standards of this district a fee in the range of $250,000 to $500,000 would be reasonable for the services rendered by petitioner. A similar recommendation was made by a written appearance filed by the County Attorney for Fairfax, Virginia, who also was obviously familiar with standards in the D.C. area. The court of appeals' finding (35a) that "none of the individual class members ever made an appearance before the district court," is simply incorrect. In addition, many other CMHCs replied in writing to the notice of fee application, a number of them opposing it.

The appellate decision errs yet again when it states that the class members were only informally advised by the NCCMHC of the retainer arrangement and that, "These benefiting class members were not parties to the retainer agreement. . . ." 30A. The fact, established without dispute in the record, is that six individual CMHCs were named plaintiffs in this case and served as class representatives. *Each of the six was specifically informed of, and agreed to the retainer arrangement contemplating a fee award if the case was successful.* Of these six, four received awards totaling over $3.3 million, or 6% of the amount released. These CMHCs clearly had a sufficiently substantial interest to serve as class representatives and protect the interests of their fellow-class members. In addition, a fifth named plaintiff, received a $806,923 award.

Finally, the conclusion that the NCCMHC, which had been the lead plaintiff in the case in chief, did "not represent the interests of the individual class members in this fee application case" (35a.) is plainly refuted by the record which shows that in both lower courts the NCCMHC's principal effort, by separate counsel, was to avoid a direct assessment against the CMHCs[8] and to hold down the amount of the award if direct assessment were made. For example, the court of appeals, the NCCMHC filed a "Response" on April 11, 1975 which sought to prevent "recourse to the locally raised funds of [NCCMHC] members." Of course, the membership of the NCCMHC includes many benefiting CMHCs. *NCCMHC II,* 387 F.Supp. at 993-4, n.1, 17a. It should be noted that there are many more CMHCs in existence than received grants as a result of this litigation. As a practical matter notice to all potential grantees would not have

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[8] The NCCMHC took this position, not in its own interest, but to protect the locally raised funds of the CMHC class members. See note 6, p. 26, *supra.*

been possible. Only after the case was concluded and the grantees selected could notice be given; before that, the publications by the NCCMHC generally advised the CMHCs throughout the country of the action and fee arrangement. Accordingly, the suggestion that petitioner should have included a statement in the complaint, filed on behalf of the plaintiffs and not himself, of his personal intention to claim a fee—a procedure never before suggested by any court in any case—would not have made any practical difference.

C.

THIS IS AN APPROPRIATE CASE FOR THIS COURT TO SET STANDARDS FOR THE AWARD OF FEES UNDER THE "COMMON BENEFIT" PRINCIPLE

If this Court undertakes to review and reverse court of appeals' decision, so as to permit an award, it will then be thrust into the question of the proper standards for determining the amount of a "common benefit" fee. Although this determination is normally left to the discretion of the trial court, appellate tribunals have not hesitated to modify awards where they have deemed such action appropriate. *Alpine Pharmacy, Inc. v. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2 Cir.), *cert. denied*, 414 U.S. 1094 (1973).

Review of the standards applied by the lower courts in this case is particularly called for for several reasons:

First, the district court, for the first time that petitioner is aware of, laid down a rule that an attorney serving the public interest by successfully bringing a class action such as the instant litigation, "cannot expect the same financial awards" as achieved by those who successfully devote themselves to "building a more remunerative commercial practice. . . ." 24a. In other words, attorneys serving the public interest who obtain

over $52 million for the class they represent, cannot expect as much compensation as an attorney who obtains $52 million for a private interest. A doctrine more calculated to deny effective representation to important public interest causes cannot be conceived, unless it is, as here, to award no fee at all.

Second, the district court essentially awarded a fee based on its "feel" of the case (23a.), rather than any expressed evaluation of the factors to which it alluded.

Third, although it did not have to reach this issue, the court of appeals went out of its way to affirm the district court's actions in this regard. Accordingly, if the determination is made that petitioner can be awarded a fee, the question of the amount of the fee becomes ripe for review by this Court.

The district court's approach in this case, of setting a fee by "feel" is basically inconsistent with the approach pioneered by the Third Circuit in *Lindy Bros. Builders, Inc. v. American R. & S. San. Corp.*, 487 F.2d 161 (3 Cir. 1973), decision after remand, 540 F.2d 102 (3 Cir. en banc 1976). The *Lindy Bros.* formula for fee calculation has been adopted in other circuits, including at least one decision in the District of Columbia. See, *e.g.*, *National Treasury Employees Union v. Nixon, supra; City of Detroit v. Grinnel Corp.*, 496 F.2d 448 (2 Cir. 1974). Yet it was flatly rejected in this case.

Unless this Court provides standards in this area, these varying determinations will continue a situation in which "there are nearly as many notations of what is reasonable [for a fee award] as there are judges." *Alpine Pharmacy, Inc. v. Pfizer & Co., Inc., supra*, 481 F.2d at 1051. Only this court can provide uniformity in this area.

CONCLUSION

For the reasons stated herein, petitioner prays that this petition be granted, and a Writ of Certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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